ARCHLAW DEVELOPMENT SDN BHD

v.

SAW EWE LEONG

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING SUMMONS NO: 22-298-2002]
16 OCTOBER 2002

CIVIL PROCEDURE: *Injunction - Action to wind-up housing developer - Interim injunction to restrain winding-up proceeding - Whether an abuse of process - Whether there was bona fide dispute to debt - Whether there were serious questions to be tried - Whether damages not an adequate remedy - Balance of convenience - Whether in favour of maintaining injunction - Rules of High Court 1980, O. 29 1(2A) (c) - Companies Act 1965, s. 218*

The plaintiff had engaged the defendant as a project consultant for its housing project in Permatang Damar Laut, Pulau Pinang. Disputes subsequently arose between the parties whereupon the defendant issued a notice under s. 218 of the Companies Act 1965 to wind-up the plaintiff. It was the defendant's case that the plaintiff was indebted to him in the sum of RM35,777.21 being fees for professional services rendered. The plaintiff took out an *ex parte* summons in chambers wherefore it successfully applied for an interim injunction to restrain the defendant from presenting the winding-up petition. At the *inter partes* hearing thereof, the plaintiff argued that it was still very solvent as it was then in the process of paying some RM4 million to various purchasers for late delivery and had more than RM900,000 in its running account. The plaintiff further argued that the action to wind-up was malicious and an abuse of process, and that the injunction ought to be maintained.

The defendant averred that the s. 218 notice was justified as the plaintiff had hitherto admitted to the debt. This apart, the defendant raised a preliminary objection that the plaintiff had not given any notice for the *ex parte* application, and had thus contravened O. 29 r. 1 (2) & (2A) (c) Rules of the High Court 1980 ('RHC'). The plaintiff explained the non-service by saying that sending out notice on the injunction would have tipped off the defendant into proceeding to do precisely what it had tried to prevent him from doing, and further that it was compelled to move urgently within the 21-day period spelt out in the s. 218 notice. The main issue that arose was whether the disputes herein had raised serious questions to be tried, and in any case whether the balance of convenience was such that the injunction and the *status quo* ought to be maintained by the court.

Held:

[1] The plaintiff had advanced cogent explanation for not giving the notice. The court is thus satisfied that the plaintiff had sufficiently complied with O. 29 r. 1(2A)(c) of the RHC. In any case, the defendant had not applied to set aside the *ex parte* order. Having failed to apply to so set aside the order and having thereafter filed affidavits in reply, the defendant is now estopped from relying on O. 29 r. 1(2A) (c) RHC. The preliminary objection in this respect must therefore be rejected. (p 50 a-c)

[2] There were clearly serious questions of facts in dispute in this case. There was merit in the plaintiff's contention in respect of the defendant's duties, particularly those that relate to the purchase and installation of lifts, namely, that it was the defendant's duty, as the expert in the mechanical and engineering field, to provide the related designs, drawings and specifications so that competitive tendering for the purchase and installation of the lifts could be opened. The relevant affidavit evidence of the plaintiff and the defendant's denial thereof showed that there were serious questions to be tried. (p 50 e-h)

[3] On the facts, there was a *bona fide* dispute as to the alleged debt. That being so, the s. 218 statutory notice of demand was an abuse of process, as the defendant ought to have filed a writ and summons in chambers to determine the issue of liability to pay. (p 51 a)

[4] Justice of the case lay in granting the injunction as to wind up the plaintiff would cause tremendous hardship to the plaintiff. Public policy also dictates the grant of injunction as any frivolous proceedings against the plaintiff would cause adverse chain reaction and ultimately demise the company itself. This apart, damages would not be an adequate remedy for the plaintiff because, if the defendant has obtained the winding-up order, it would be practically impossible for the court to subsequently make remedial orders on account of the many irreversible changes flowing from the winding-up order. Clearly, the balance of convenience was in favour of making the orders sought for by the plaintiff. (p 51 c-e)

[Application for injunction allowed; defendant restrained from proceeding with winding-up.]

Case(s) referred to:

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Pengkalen Securities Sdn Bhd v. Leow Li Lain [1997] 5 CLJ 440 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

Housing Developers (Control and Licensing) Act 1966, ss. 7A, 24

Housing Developers (Housing Development Account) Regulations 1991, r. 7

Rules of the High Court 1980, O. 29 r. 1(2), (2A)(c)

For the plaintiff - N Kanakavalli (Teh Beng Chneah); M/s BC Teh & Yeoh

For the defendant - Lim Choon Khim; M/s Presgrave & Matthews

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

The plaintiff is a housing developer and was at all material times developing a housing project known as Rumah Pangsa Kos Rendah on Lots 1518, 1521, 816 and 824, Mukim 12, S.W.D., Daerah Barat Daya, Permatang Damar Laut, Pulau Pinang.

Plaintiff's Case

It is the case of the plaintiff that the defendant had at all material times agreed to undertake the task of Consultant Mechanical and Electrical Engineering, in the most professional manner. The plaintiff accepted the defendant in that capacity by a letter dated 12 December 1995 and appointed him the Project Consultant for Mechanical and Electrical Engineering Works. The plaintiff contended that it was a term of the agreement between the parties that the defendant's work in relation to the said project included works relating to:

(A) Electrical & Telephone

1) Internal Lighting Distribution System

2) Internal Telephone Distribution System

3) External TNB Infrastructure

4) External Telecom Infrastructure

5) Street Lighting & Compound Lighting

6) Stanby Genset System

7) MATV

(B) Fire Protection System

(C) Lifts

The defendant also undertook the following duties:

1) to investigate available data for information relating to the project and which are relevant to the works and collaborating with other professional advisers appointed by the client.

2) to negotiate and arrange for incoming electrical supply from Tenaga Nasional Berhad.

3) to liaise with the fire department regarding fire fighting requirements and obtaining approval.

4) to liaise with telecoms regarding telephone lines and obtaining approval.

5) to prepare and draw up such designs, drawings and specifications as may be necessary for placing contracts for the execution of the works. These drawings are the 'tender drawings' to be completed in such detail as to enable competitive tenders to be obtained.

6) to examine and report on tenders or estimates and advising the acceptance by the client of any tender.

7) to provide periodical supervision of the installation and administration of the contract.

8) to obtain clearance for O.C./C.F.

The plaintiff pleaded that it was also a term of the said agreement that the plaintiff would pay the defendant 3% of the total mechanical and electrical costs upon completion of the said project. It is the plaintiff's case that the defendant breached the terms of the said agreement and as a result of which the plaintiff was unable to complete the project on time and thereby suffered loss. For the purposes of the present issue before me there is no need to reproduce the numerous breaches the plaintiff had enumerated in the statement of claim. One of the major complaints of the plaintiff related to purchase and installation of the lifts. The plaintiff contended that the defendant had failed to prepare or with due care to prepare the tender documents relating to the 'lift contract' so that competitive tenders could be proceeded with as agreed in cls. 5 and 6 of the said agreement. The plaintiff also accused the defendant of failing to call for tenders relating to the lift contracts relating to the purchase and installation of the said lifts. Because of the defendant's breaches the plaintiff had to on its own, accept an offer from one Harden Elevators Sdn. Bhd (Harden) for

the sale and installation of the said lifts. Various other particulars of breaches were leveled against the defendant for failing to supervise and advice the plaintiff in respect of the works carried out by Harden. Because of the shoddy works of Harden in the installation of the lifts, the plaintiff was forced to terminate the contract with Harden. The plaintiff was then forced to look for a fresh supplier to supply and instal new lifts and this the plaintiff contended hampered its project further. Further, the plaintiff contended that the defendant failed to arrange for the mandatory inspection by the Fire Department, the Machinery Department, the Telecoms Department, Tenaga National Berhad, in relation to the installation of the said lifts. The defendant had also failed to obtain the letter of clearance pursuant to cl. 8 of the said agreement. As a result of all the above professional misconduct of the defendant, the plaintiff contended that it sustained loss by not completing the project in time and thus had to answer to the purchasers as the certificates of fitness were delayed.

The plaintiff was however surprised that notwithstanding all these breaches on his part, the defendant had sent the plaintiff a s. 218 Companies Act 1965 notice claiming a sum of RM35,777.21 being his fees for professional services rendered. The plaintiff however disputed the said sum. The plaintiff also contended that the defendant had not shown that the plaintiff did not intend to pay the said sum if it became due. The plaintiff however made an offer to settle the defendant's claim without first verifying the claim by three instalments on condition the defendant instructed its solicitors to withdraw the impending action. However when the plaintiff subsequently verified the defendant's claim, the plaintiff realised that the defendant had failed to take into account the sums due to the plaintiff from the defendant.

The plaintiff contended that serving such a notice based on the facts so far available, clearly meant that the defendant was pressuring the plaintiff and forcing it to submit to the demands of the defendant and to pay the sum which the plaintiff contended the defendant was not entitled to. As the plaintiff would suffer irreparable damages to its reputation as a developer if the defendant was allowed to proceed to present the winding up petition, the plaintiff sought an injunction to restrain the defendant from filing the winding-up petition. Having filed the writ the plaintiff then took out an *ex parte* summons in chambers with an affidavit in support (encl. 3) and prayed for the following orders:

1. An injunction to restrain the defendant or his servants or agents from presenting a winding-up petition under s. 218 of the Companies Act 1965 in respect of a sum of RM35,777.21 which he had claimed pursuant to a s. 218 notice dated 15.5.2002 and which was received by the plaintiff on the same day.

2. That in the event such a petition had been presented then the defendant or his servant or agents be prevented from proceeding with the said petition by advertising the said winding up proceedings until the said writ filed herein be heard and a decision given.

3. Costs.

4. Such further or other relief that this Court would deem fit and proper.

I heard the *ex parte* summons and granted an order in terms and fixed a date for the hearing of the *inter partes*. At the hearing of the *inter partes*, the plaintiff contended that because of the defendant's breaches it had to pay 392 purchasers various sums for late delivery and that the said payments totalled to about RM4 million. The plaintiff contended that he was still in the process of settling with the various purchasers. The plaintiff argued that whilst the defendant was aware of these facts, the defendant had with *mala fides* served the s. 218 notice on the plaintiff for a mere RM35,777.21. The plaintiff averred that it was solvent and was still carrying on housing development projects. The plaintiff exhibited its Housing Development Account which is a mandatory account it has to keep pursuant to s. 7A of the Housing Developers (Control and Licensing) Act 1966 which reads as follows:

(1) Subject to subsection (9), every licensed housing developer shall open and maintain a Housing Development Account with a bank or finance company for each housing development undertaken by the licensed housing developer.

In the account the plaintiff showed that it had a sum of RM907,947.03 as of April 2002. The plaintiff contended that the defendant's action in seeking to wind-up the plaintiff was malicious and an abuse of the process of the court. The plaintiff pointed out that since it has a running account in relation to this development pursuant to s. 7A of the Housing Developers (Control and Licensing) Act 1966, any attempt to wind-up the plaintiff over such a small sum would cause much mischief and disrupt the plaintiff's business. The plaintiff argued that its credit-worthiness and reputation would be tarnished by a winding-up petition and that such an act would cause irreparable loss to its reputation which cannot be compensated with damages. The plaintiff therefore urged the court to maintain the injunction until the hearing of this suit.

Case For The Defence

At the outset the defendant raised a preliminary objection in its affidavit in reply by stating that there was no personal service. The defendant argued that the plaintiff could not apply to restrain him from filing a winding-up petition pursuant to s. 218 of the Companies Act 1965. Referring to the letter written by the plaintiff in which the plaintiff agreed to pay the said sum in three monthly instalments, the defendant contended that the plaintiff had in fact

admitted to the debt. Denying that he had breached any of the terms of the agreement the defendant contended that his claim was made *bona fide*. The defendant expressly admitted that his fees of 3% of the "total Mechanical and Electrical Cost," was to be paid upon completion of the entire project.

The defendant also specifically denied that it was his duty to call for tenders in respect of the project works and for the purchase and installation of the lifts. His job was merely to provide designs, drawings and specifications, when called upon to do so called "tender drawings". He contended that because the plaintiff had failed to pay the initial contractors for the purchase and installation of the lifts and the said initial contractors having ceased to complete the works relating to the lifts, the plaintiff was thus compelled to retain the services of Harden. The defendant maintained that he had always acted professionally. He also averred that it was possible that because the plaintiff had failed to pay Harden, Harden too must have therefore terminated its services. As for the delay in the completion of the project the defendant averred that the said delay was occasioned by the plaintiff's own carelessness in failing to make prompt payments to the various contractors in respect of the installation of the lifts. The defendant also averred that the reason the plaintiff had to pay compensation to the purchasers for late delivery was because of the plaintiff's own negligence. The defendant also contended that the plaintiff ought to have exhibited its bank statement to show its solvency. The defendant also averred that the Housing Development Account was a client's account and that the plaintiff had no access to it.

The Plaintiff's Reply

In reply the plaintiff averred through its director that when the Court's Process Server attempted to effect personal service on the defendant, the defendant attempted to run away and evade service. The Court Process Server's affidavit exhibited showed that he drew the defendant's attention to the summons and the *ex parte* order and to all other relevant cause papers before leaving it in front of him. The plaintiff contended that the denial of the defendant of personal service was scandalous and an affront to the integrity of the Court's Process Server and thereby affecting the integrity of the court.

Referring to the defendant's denial that he had breached conditions of his contract by failing to provide periodical supervision the plaintiff referred to cl. 7 of the said agreement which specifically required that the defendant do "provide periodical supervision of the installation and administration of the contract". The plaintiff argued that it was the duty of the defendant to have maintained such periodic supervision and by his failure to do so, he had indeed breached *inter alia* cl. 7 of the said agreement.

In respect of the defendant's denial that it was his duty to call for tenders to enable competitive tendering and thereby enabling the plaintiff to select the most competitive tenderer, the plaintiff referred to cls. 5 and 6 of the agreement which state as follows:

Clause 5

Preparing and drawing up such designs, drawings, and specifications as may be necessary for placing contractors for the execution of the works. These drawings are the Tender Drawings completed in such detail as to enable competitive tenders to be obtained.

Clause 6

Examining and reporting on tenders or estimates and advising the acceptance by the client of any tender.

In respect of this the plaintiff referred to a letter dated 15 June 1996 which reads as follows:

ARCHLAW DEVELOPMENT SDN. BHD.
(Co. No 299022-A)

(Units 3 & 4, 7th Floor Canton Square, 56 Cantonment Road,
10250 Penang) Tel:
(04) 229-229-0430 Fax: (04) 229-2187)

Your Ref: SAA 95(11/7)
Our Ref: AY/D1/GEN/41/96/PN

Date: 15th June 1996

Messrs Saw & Associates,
318, 1st Floor
Jalan Jelutong
11600 PENANG

BY MAIL

Dear Sis,

RE: INVITING TENDERS FOR DESA JELITA PHASE I

We refer to your offer letter dated 7th November 1995 which was duly accepted by us and our appointment letter dated 14th May 1996. We would be pleased if you could make available to us a copy each of tender drawings for the various aspects of the job for our record, as considerable time has been lost and let us know at least 14 days ahead of time when you intend to invite tenders on our behalf.

We would like to stress here the importance of holding the tender exercises early as time is cost to us.

Yours faithfully
ARCHLAW DEVELOPMENT SDN BHD

sgd. Allan K.L. Yoon
MANAGING DIRECTOR

In respect of the defendant's averment that it was he who obtained the letters of clearance to enable the plaintiff to get the Certificates of Fitness for the project, the plaintiff, whilst denying this, contended that it was the plaintiff's director who had affirmed the affidavits in support, who personally obtained the letters of clearance and who had handed the same to the architect. The architect himself has affirmed an affidavit (encl. 14) to this effect and specifically denied in that affidavit that it was the defendant who was responsible for obtaining the letters of clearance. The plaintiff was quick to point out that it was the duty of the defendant and not its duty to obtain the letters of clearance. (See item 8 under duties of defendant as stated earlier.)

In response to the defendant's reference to the letter whereby the plaintiff agreed to settle the sum claimed by three instalments the plaintiff averred that whilst agreeing to pay, the plaintiff reserved its right to challenge the veracity of the claim subsequently. It was the plaintiff's case that it was compelled by circumstances to agree to pay in the manner suggested, to register its disagreement on its liability to pay.

In respect of the defendant's allegation that the "Housing Developer's Account" is a client's account, the plaintiff denied the same and pointed out that the plaintiff is entitled to withdraw monies from the account for the cost of the project pursuant to r. 7 of the Housing Developers (Housing Development Account) Regulations 1991 made pursuant to s. 24 of the Housing Developers (Control and Licensing) Act 1966. Rule 7 lists 15 grounds under which money from the Housing Development Account can be withdrawn and it would seem clearly that the plaintiff would be entitled to withdraw from this account, for the cost of the project.

The Defendant's Response

In response the defendant now raised a further new preliminary objection in his affidavit (encl. 16) which was that the plaintiff had failed to comply with O. 29 r. 1(2A) of the Rules of the High Court 1980 (the RHC). In response to the process server's affidavit the defendant averred that since the process server was not in uniform and since he was accompanied by the plaintiff's director and representative he thought he was going to be assaulted for sending the s. 218 notice and so he ran.

Findings Of The Court

On the date fixed for the hearing of the *inter partes* application Cik Kanagavalli for the plaintiff informed the court that she was only served with encl. 16 a few minutes before the *inter partes* hearing. She asked for the matter to be stood down for her to see if she needed to request for an adjournment to respond or whether she could proceed without a reply. After a short adjournment by which time she had read encl. 16 and had taken client's instructions, she informed the court that she was prepared to proceed with her *inter partes* application. Mr Kwang for the defendant then informed the court that he was not proceeding with the first preliminary objection of non-personal service. As regard to the second preliminary objection he contended that the plaintiff had failed to comply with O. 29 r. 1(2), (2A)(c) of the RHC which reads as follows:

> Rule 1(2A)(c)
>
> 1. (1) xxx
>
> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.
>
> (2A) The affidavit in support shall contain a clear and concise statement:
>
> (a) xxx
>
> (b) xxx
>
> (c) of the facts relied on as justifying application *ex parte*, including details of any notice given to the defendant or, if none has been given, the reason for giving none.

It was the defendant's preliminary objection that the plaintiff had not, in its affidavit in support of the *ex parte* application, given reasons for not giving the notice.

The plaintiff contended that even though it was willing to settle the sum in instalments under protest, and the defendant having refused to accept the offer of settlement, sending a notice of its intention to take out the injunction, would have tipped off the defendant into proceeding to do precisely what the plaintiff did not want the defendant to do without this trial. The plaintiff also pointed out that since the defendant had issued out a s. 218 notice which would take effect exactly 21 days from the date the notice was issued and that any failure to pay within the 21 days would result in the plaintiff being forthwith liable to be wound-up, the plaintiff averred that it was urgent and imperative that it proceeded to get an *ex parte* order since the 21 days had expired on 5 June 2002 and the defendant could at any time take out winding-up proceedings.

I was satisfied with the explanation given by the plaintiff and held that the plaintiff had sufficiently complied with O. 29 r. 1(2A)(c) of the RHC.

In any case the said rule applied to *ex parte* applications only. To a question from the court Mr. Kwang readily conceded that his client had not filed any application to set aside the *ex parte* order. I therefore held that having failed to apply to set aside the *ex parte* order and having filed affidavits in reply, the defendant was now estopped from relying on O. 29 r. 1(2A)(c) of the RHC which applied to *ex parte* applications. Based on this and together with the fact that I had accepted the plaintiff's explanation, I rejected the defendant's preliminary objection.

Having read all the affidavits I then considered whether there were serious questions to be tried since the plaintiff had averred that notwithstanding its agreement to settle the small claim of the defendant by three instalments, yet on subsequent perusal and vetting of the defendant's accounts the plaintiff had discovered that the amount demanded is neither in fact nor in law payable.

Serious Questions To Be Tried

The facts narrated clearly show that there are serious questions of facts in dispute. The main issue relates to the purchase and installation of lifts. It is the plaintiff's case that it was the duty of the defendant as the expert in the mechanical and engineering field to provide designs, drawings and specifications called tender documents when called upon to do so, so that competitive tendering for the purchase and installation of the lifts could be opened, to enable the plaintiff to chose the best contractor and at the best price. The defendant's case is that, that is not his job. Looking at the letter of offer of the plaintiff dated 7 November 1995 and which letter of offer was accepted by the defendant and the plaintiff's subsequent letter dated 15 June 1996 which I have reproduced, cl. 5 seems to suggest that the plaintiff has merit in what it contends with regard to the defendant's duties. At this stage this court is not to make any findings or arrive at any decisions. All this court has to do is to see if the plaintiff has raised sufficient triable issues. The affidavit evidence of the plaintiff and denied by the defendant shows that there are serious questions to be tried and it therefore becomes necessary to consider the balance of convenience issue. Besides, in contending that the plaintiff had to pay its purchasers for late delivery because of the plaintiff's own negligence, other than making a bare statement that the plaintiff was negligent, the defendant failed to substantiate with facts. Accusing the plaintiff of negligence without stating the particulars, is unacceptable. Having at the forefront of my mind the guidelines set in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah and Ors.* [1995] l CLJ 293 CA I find that the facts of this case bear similarities to my decision in *Pengkalen Securities Sdn. Bhd. v. Leow Li Lain* [1997] 5

CLJ 440 where I held like in this case that there was a *bona fide* dispute as to the alleged debt and that a s. 218 statutory notice of demand was an abuse of process and that the defendant ought to have filed a writ and summons-in-chambers to determine the issue of liability to pay. I also held in that case that the justice of the case lay in granting the injunction as the debt was clearly in dispute and to wind-up the plaintiff would cause tremendous hardship and that the balance of convenience favoured the grant of the injunction to maintain *status quo*. Public policy would also dictate the grant of the injunction in this case as the plaintiff is a housing developer and any frivolous winding-up proceedings against a housing developer would cause adverse chain reaction and ultimately the demise of the company itself. At a time when all efforts are being made to boost the economy and to give every opportunity for businesses to remain afloat and vibrant to generate liquidity, simply applying to wind-up large companies including housing developers for small sums must be discouraged, more so when the alleged small debts are strenuously resisted.

The other reason in my view for granting the injunction is the fact that damages would not be an adequate remedy for the plaintiff because if the defendant is not injuncted and if he obtains the winding-up order, it would be practically impossible for this court to make any remedial orders later because there would be so many irreversible changes flowing from the winding-up order. Accordingly it is my judgment that the balance of convenience lay in favour of making the orders sought by the plaintiff. Besides, the reputation of a housing developer is his best advertisement. To drag a housing developer through a protracted winding-up proceeding more so when the alleged debt is hotly disputed, is akin to raking the developer through a horse-manured field. He might vindicate himself finally but the foul smell of a seedy reputation will linger on. His reputation is what is sacrosanct to a developer.

I therefore granted the plaintiff an order in terms of Prayers (1), (2) and (3).